

1 Simon Peter Serrano, WSBA No. 54769  
2 Silent Majority Foundation  
3 5238 Outlet Dr.  
4 Pasco, WA 99301  
(509) 567-7083  
pete@silentmajorityfoundation.org  
*Attorney for Plaintiffs*

5  
6 **UNITED STATES DISTRICT COURT**  
7 **EASTERN DISTRICT OF WASHINGTON**

8 MICHAEL SCOTT BRUMBACK,  
9 an individual, et al.,  
10 Plaintiffs,

11 v.

12 ROBERT W. FERGUSON, in his  
13 official capacity as Washington  
14 State Attorney General, et al.,  
15 Defendants,

16 ALLIANCE FOR GUN  
17 RESPONSIBILITY,  
18 Intervenor- Defendant.

No. 1:22-cv-03093-MKD

PLAINTIFFS' RESPONSE TO  
STATE DEFENDANTS AND  
INTERVENOR-DEFENDANT'S  
MOTION TO STRIKE  
PLAINTIFFS' NOTICE OF  
SUPPLEMENTAL  
AUTHORITIES

January 23, 2023  
Without Oral Argument

19 **I. INTRODUCTION**

20  
21 Plaintiffs oppose Defendant and Defendant-Intervenor's request to strike the  
22 documents Plaintiffs filed as supplemental authority at Docket No. ECF 41. If the  
23 Court is not amenable to retaining **all** documents filed under ECF No. 41 (ECF Nos.  
24

25 PLAINTIFFS' RESPONSE TO  
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1 41-1, 41-2, 41-3, 41-4, 41-5, 41-6, 41-7, 41-8, 41-9, 41-10, 41-11, and 41-12),  
 2 Plaintiffs seek this court to retain in the very least Documents ECF No. 41-1, 41-2,  
 3 41-3, 41-5, 41-6, and 41-7 as part of the record as those documents clearly  
 4 demonstrate the critical elements of this case as addressed, below.  
 5

## 6 **II. RELEVANT FACTS**

7  
 8 The filed documents are relevant as they demonstrate critical elements of this  
 9 case, namely the State's enforcement of the challenged laws (RCW 9.41.370 and  
 10 .375). This section will address the basis for the Court to retain at least Documents  
 11 ECF No. 41-1, 41-2, 41-3, 41-5, 41-6, and 41-7 as part of the Record.  
 12

### 13 **A. ECF No. 41-1 is the Declaration of Austin Hatcher, attorney in both cases.**

14  
 15 ECF No. 41-1 is the Declaration of Austin Hatcher, attorney in both cases and  
 16 offers no substance, but provides notice of the information in the various documents  
 17 attached as exhibits to ECF No. 41. The Court need not retain this document, although  
 18 it may be beneficial for organizational purposes (i.e., to track all retained documents).

### 19 **B. ECF No. 41-2 is an enforcement action by State Defendants on the issues** 20 **challenged in this lawsuit.**

21  
 22 ECF No. 41-2, is the State of Washington's Complaint and Motion for *State of*  
 23 *Washington v. Federal Way Discount Guns, LLC*, King County Superior Court Case  
 24 No.: 22-2-20064-2-SEA filed on December 9, 2022. The documents demonstrates

1 that the State is enforcing the provisions of RCW 9.41 challenged in this lawsuit  
 2 (ECF No. 41-1).

3  
 4 **C. ECF No. 41-3 is the Defendants’ position in the *Federal Way Guns* case,**  
 5 **which is similar to Plaintiffs’ positions in this matter.**

6 ECF No. 41-3 is a responsive pleading in the *Federal Way Discount Guns*  
 7 matter and was offered to demonstrate that the litigation and enforcement of RCW  
 8 9.41 are ongoing.  
 9

10 **D. ECF Nos. 41-5 and 41-6 are expert testimonies relevant to the matter at**  
 11 **hand.**

12  
 13 ECF No. 41-5 and 41-6 is the expert testimonies of Mark Hanish and Ashley  
 14 Hlebinsky, respectively and offer testimony related to current and historical use of  
 15 Large Capacity magazines and firearms that use such magazine.  
 16

17 **E. ECF Nos. 41-7 is a copy of an Order from the Oregon District Court (State**  
 18 **Court) Enjoining Oregon’s Measure 114, which has a “Large Capacity Magazine”**  
 19 **Ban.**

20  
 21 Defendants do not oppose the inclusion of this document in the Record but  
 22 dispute the binding or persuasive nature of the document. As Plaintiffs’ challenge to  
 23 the modifications to RCW 9.41 is a case of first impression in this state, while the  
 24

Oregon Court’s decision is not binding, it offers valuable context and content, no different than any other decisions arising outside of the Ninth Circuit or the United States Supreme Court. (ECF No. 42, at 1-2.) Because the Oregon Court’s decision is “relevant to the issues in this action, the supplemental authority is helpful in developing the Court’s analysis.” *Tao Grp. Holdings, LLC v. Emp’rs Ins. Co. of Wausau*, No. 2:21-cv-00382-GMN-NJK, 2022 U.S. Dist. LEXIS 41520, at \*2 n.1 (D. Nev. Mar. 8, 2022). Furthermore, as neither party objects to the inclusion of ECF No. 41-7, the Court should retain it as part of the record.

### III. ARGUMENT

Eastern District of Washington local rules do not address providing supplemental authority to the Court; however, Western District of Washington local rule 7(n) addresses the matter, as follows:

Before the court rules on a pending motion, a party may bring to the court’s attention relevant authority issued after the date the party’s last brief was filed by serving and filing a Notice of Supplemental Authority that attaches the supplemental authority without argument.

Plaintiffs filed the Motion for Supplemental Authorities *before* the court issued a ruling on the Motion for Preliminary Injunction, and all documents submitted as Supplemental Authority were filed or issued *after* the briefing and the hearing were

1 completed; thus, while not controlling, the Motion was timely under Western District  
2 Local Rule 7(n).

3  
4 As noted in a matter recently before the Western District of Washington  
5 wherein Judge Jones Denied a Motion to Strike Supplemental Pleadings, “the Court  
6 must consider state court judgments on related matters litigated between the same  
7 parties or their privies.” *Ozone Int’l, LLC v. Wheatsheaf Grp. US, Inc.*, No. 3:19-cv-  
8 06155-RAJ, 2021 U.S. Dist. LEXIS 63140, at \*7-8 (W.D. Wash. Mar. 31, 2021).  
9 citing *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 921 (9th Cir. 2003). While the  
10 documents filed are not decisions from the lower court, they do inform the Court of  
11 the states of a matter that could have a “preclusive effect” on the claims before this  
12 Court. *Id.* at 11. Thus, the filed documents have value to this Court in its

13  
14  
15  
16 Notably, the State of Washington is a Party in each case; while no judgment  
17 has been rendered on the *State of Washington v. Federal Way Discount Guns*, it is  
18 proper for this Court to be aware of the posture the State has taken to enforce the  
19 provisions of RCW 9.41 challenged in this case; hence, the inclusion of ECF Nos.  
20 41-2 and 41-3 offer notice of the positions taken by the State and opposing counsel  
21 in related matters. Moreover, the State’s enforcement of RCW 9.41 supports  
22 Plaintiffs’ claims in this matter that both purchaser and vendor rights to sell/purchase  
23  
24

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1 firearms has been infringed through the State's enactment and enforcement of the  
 2 challenged provisions of RCW 9.41. (ECF No. 21-1, at 15-17.) ECF No 41-2 clearly  
 3 strikes at Plaintiffs' response to the Court during oral arguments with the question of  
 4 the impact to Plaintiff Gimme Guns. In response, Plaintiffs' counsel noted the State's  
 5 ability to enforce the challenged laws, RCW 9.41.370 and .375, would result in a  
 6 direct impact for firearms dealers, and this is the precise nature of *State of*  
 7 *Washington v. Federal Way Discount Guns*, cited in ECF Nos. 41-2 and 41-3.  
 8

9  
 10 Regarding ECF Nos. 41-5 and 41-6, while these are not binding court  
 11 decisions, these are the types of documents that the Western District of Washington  
 12 has allowed, finding that "some courts have permitted parties to file supplemental  
 13 exhibits after the relevant motion's noting date," although such supplemental exhibits  
 14 are often offered subsequent to a motion for authorization to supplement the  
 15 record. *Blough v. Shea Homes, Inc.*, No. 2:12-cv-01493 RSM, 2014 U.S. Dist.  
 16 LEXIS 100600, at \*53-54 (W.D. Wash. July 23, 2014) citing *Continental Cas. Co.*  
 17 *v. Duyzend*, 2014 U.S. Dist. LEXIS 14371, 2014 WL 468014 (W.D. Wash. 2014,  
 18 where the court allowed Plaintiff to supplement the record with two emails that were  
 19 previously unavailable to Plaintiff "for the purpose of compiling a complete record"  
 20 on a specific issue before the court); and *Tilden-Coil Constructors, Inc. v. Landmark*  
 21 *Am. Ins. Co.*, 2011 U.S. Dist. LEXIS 20165, 2011 WL 780876 (W.D. Wash. 2011  
 22  
 23  
 24  
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1 holding that while the moving party had “ample opportunity” to file the supplemental  
 2 papers, the court admitted the requested information to complete the record and  
 3 because the non-moving part had access to the admitted documents). Here, these  
 4 documents are publicly available, and one of Defendant in this case *brought* the other  
 5 matter. Defendant clearly has access to and notice of ECF Nos. 41-5 and 41-6.  
 6 Moreover, as no order has been issued on Plaintiffs’ Motion for Preliminary  
 7 Injunction, these documents will serve to complete the record. If the Court declines  
 8 to admit these documents at this time, Plaintiffs will file a motion seeking leave of  
 9 the Court to include these documents in the record.  
 10  
 11

12  
 13 Finally, as noted above, ECF No. 41-7 is a decision rendered in the State of  
 14 Oregon on a related matter, and Defendants do not object to the inclusion of this  
 15 document.  
 16

#### 17 **F. CONCLUSION**

18 ECF Nos. 41-1, 41-2, 41-3, 41-4, 41-5, 41-6, 41-7, 41-8, 41-9, 41-10, 41-11, and  
 19 41-12 should be retained as part of this record; however, if the Court finds that some of  
 20 the listed documents consist of testimony inapplicable to this matter, the Court should,  
 21 at a minimum, retain Docket numbers 41-1, 41-2, 41-3, 41-5, 41-6, and 41-7 as part of  
 22 the Record as these documents demonstrate that the State is enforcing the laws  
 23  
 24

1 challenged in this matter and such enforcement was unknown to Plaintiffs prior to all  
2 filings and hearings to date.

3  
4 **DATED this 28th day of December 2022.**

5 **SILENT MAJORITY FOUNDATION**

6 /s/Simon Peter Serrano

7  
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10 Pasco, WA 99301  
11 (509)567-7083  
12 pete@silentmajorityfoundation.org

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25 Counsel for Plaintiffs



**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of December 2022, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 28th day of December 2022.

/s/Madeline Johnson  
Madeline Johnson